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IN THE

Supreme Court of the United States

October Term, 1961.

No. 848

PHILL SILVER, as a taxpayer of the City of Los Angeles and on behalf of all other taxpayers of the City of Los Angeles,

Plaintiff and Petitioner,

vs.

THE CITY OF LOS ANGELES, a municipal corporation, LOS ANGELES HARBOR OIL DEVELOPMENT COMPANY, *et al.*,

Defendants and Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

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IN THE

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OCTOBER TERM, 1961.

No. .....

PHILL SILVER, as a taxpayer of the City of Los Angeles and on behalf of all other taxpayers of the City of Los Angeles,

Plaintiff and Petitioner,

vs.

THE CITY OF LOS ANGELES, a municipal corporation, LOS ANGELES HARBOR OIL DEVELOPMENT COMPANY, *et al.*,

Defendants and Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Plaintiff and Respondent in the court below, Phill Silver suing as a taxpayer of the City of Los Angeles and on behalf of all other taxpayers of the City of Los Angeles, the Petitioner herein prays that a Writ of Certiorari be issued to review the final decree of the Supreme Court of the State of California reversing the judgment of the Superior Court of Los Angeles County and of the District Court of Appeal, 2nd Appellate District, respectively.

The Superior Court, after a trial on the merits, invalidated a tideland lease awarded by the City Council of the City of Los Angeles to the Defendant Los Angeles Harbor Oil Development Company, a private corporation.

The District Court of Appeal affirmed the judgment of the Superior Court. The Supreme Court of California reversed the judgment without remanding the case for a re-trial.

Statement of Matter Involved.

The case involves a suit by a taxpayer to have a tideland oil lease awarded by the City of Los Angeles to a private corporation declared null and void.

Petitioner's Second Amended Complaint consisted of 5 causes of action. The theory of the first cause of action was that the Council of the City of Los Angeles had committed a manifest abuse of discretion in approving a lease to the defendant, and appellant, Los Angeles Harbor Oil Development Company, without first giving either the Union Oil Company and its affiliated companies or General Petroleum Corporation a reasonable opportunity to negotiate with the Council for a lease, or to submit a lease bid. [Clk. Tr. Vol. I. pp. 123-131.]

In this cause of action the Petitioner alleged that the Charter of the City of Los Angeles was silent as to the leasing method to be followed in the leasing of the State granted tidelands; and that there was a duty enjoined upon the Council to exercise prudence and discretion in obtaining lease bids so far as reasonably practicable and that they failed to do so. [Clk. Tr. Vol. I. p. 130, pars. 20 and 22.]

The theory of the third cause of action was that the acts of the City Council in restricting lease proposals to one corporation had contravened the provisions of (Article 1), Sec. 21, of the California Constitution, as well as the equal protection clause of the Fourteenth Amendment of the United States Constitution. [Clk. Tr. Vol. I. pp. 133-134.]

In this cause of action it was alleged that prior to the making and issuance of the lease by the City of Los Angeles to the Los Angeles Harbor Oil Development Company, the Los Angeles City Council had failed and refused to grant other persons, firms or corporations a reasonable opportunity to submit an offer to the City of Los Angeles for the leasing of the City owned tidelands outside of the Los Angeles Harbor. It was alleged that the acts of the defendants had prevented competition in the leasing of said lands and had resulted in a lease being awarded to the defendant Los Angeles Harbor Oil Development Company on royalty and bonus terms far below the royalty and bonus terms the City of Los Angeles would have obtained, had other firms interested in leasing these tidelands been permitted to submit lease proposals. [Clk. Tr. p. 133, par. 2.]

The theory of the fourth cause of action was that by the acceptance of the grant of the tidelands from the State of California on the conditions imposed by the State of California, the City of Los Angeles had received title to said lands in Trust for the benefit of the people, that the right to itself drill for oil or to issue leases to others for this purpose was at all times subject to the same trust, that as such trustee, the City of Los Angeles assumed the same burdens and was subject to the same

regulations that pertain to other trustees of such trust, that there was a duty on the part of the City of Los Angeles to exercise reasonable care, prudence, and good business judgment in obtaining a qualified lessee on the most favorable terms available in the leasing of the rich oil resources entrusted to its care and supervision. That the City of Los Angeles in leasing said lands without giving the Union Oil Company a reasonable opportunity to submit their lease proposal in accordance with the extension of time which was granted to them by the Committee on Industry and Transportation, and in adopting a Resolution approving an oil lease to the defendant Los Angeles Harbor Oil Development Company without first giving other oil companies identified a reasonable opportunity to negotiate for a lease with the City of Los Angeles and to submit lease bids to the City of Los Angeles in accordance with the requests made, committed an abuse of the discretion vested within it as such a trustee. [Clk. Tr. Vol. I. pp. 134-136.]

With respect to each cause of action, the plaintiff contended that the lease was null and void.

The Findings of Fact and Conclusions of Law.

The Trial Court, among other findings of fact and conclusions of law, found as follows:

(1) That the City holds title to the submerged lands outside the breakwater of the City of Los Angeles in Trust and as trustee of a voluntary express trust;

(2) That as such trustee, the City of Los Angeles was bound to exercise the same prudence and was subject to the same duties, care and responsibility that apply to other trustees of other voluntary express trusts;

(3) That the City of Los Angeles was bound as a duty imposed by law to exercise in the management and leasing of the trust property, the same judgment and care under the circumstances which men of prudence, discretion, and intelligence exercise in the management of their own affairs, under a duty in all matters connected with the trust to act in the highest of good faith to and for the beneficiary;

(4) That the failure and omission on the part of the City as such trustee of an express trust to perform and comply with said duties specifically imposed and enjoined by law upon it constitutes a constructive fraud and vitiates the transaction, constituting an abuse of its powers as such trustee irrespective of whether the lease was or was not the best that it could procure;

(5) That the City did not in the management and leasing of the Trust Estate exercise the judgment and care under the circumstances which men of prudence, discretion and intelligence exercise in the management and leasing of their own property in the exercise of the highest good faith to and for its beneficiary and did not therefore perform a duty imposed and enjoined by law. That although requested by other highly experienced, capable, financially responsible and desirous lessees to negotiate with them, the trustee failed and omitted so to do and withheld from such applicants, though requested by them, information in the possession of the trustee as to the potentials of the trust lands desired to be leased. That although the trustee had expended substantial funds for a determination of the possible potential value of the Trust Estate and had received written opinions from experts retained by the

trustee hypothesizing the possibility of oil and gas existing in the trust property, the trustee knowing that the applicants had not the opportunity to make an investigation thereof, notwithstanding the said applicants request for information concerning the existence thereof in the possession of the trustee, and notwithstanding that the reports of the trustee's experts were public records, the trustee withheld from the applicants the information concerning the existence of such reports and incorrectly advised the applicants that it had no information with reference thereto.

That notwithstanding the fact that applications for leasing and requests for negotiations for leasing were made to the trustee through a Committee of the City Council by other companies involved in the exploration and development of properties for oil, gas and other hydrocarbon substances, and without a full and complete investigation, the trustee failed and omitted to negotiate with such applicants, disregarded the advice of the experts theretofore retained by the trustee, set no standards as advised by the experts to enable competitive bidding and without solicitation of any offers upon an equal footing from other experienced, capable and financially responsible applicants within the business field for which the trust property was deemed valuable, leased the trust property to a corporation without equipment, organization or capital, but whose organizers were otherwise financially capable though under no legally binding contract so to do to provide such capital.

The District Court of Appeal in affirming the judgment for the plaintiff herein rendered in the Superior Court reiterated that it was a thoroughly established

rule of law in the State of California that a taxpayer may sue in a representative capacity in cases involving the failure of a governmental body to perform a duty specifically enjoined. The District Court of Appeal then declared that after duly considering the findings of fact and conclusions of law reached by the Trial Court, that these findings by the Superior Court amply supported the Trial Court's determination that the City had failed to discharge its trust responsibility in that the defendant City of Los Angeles failed to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property, thereby violating duties enjoined on it by law in a transaction leading up to its execution of an oil and gas lease covering city owned lands.

The Supreme Court of California after granting a hearing to the defendant Development Company, reversed the judgment of the Superior Court and the affirmance of the District Court of Appeal, without remanding the case for a new trial. A Petition for a Rehearing was denied. The Supreme Court in reversing the respective decision based their conclusion upon two major points:

One: that the manner in which the defendant municipality effectuates the purpose of the tidelands trust hereinmentioned, including the manner in which it conducts negotiations for the leasing of the lands, is a municipal affair and that they are answerable to the electorate and not the courts.

Two: that the petitioner herein lacks capacity to maintain this suit.

This latter point was decided on an interpretation by the Supreme Court of a stipulation entered into by the

parties herein before the Trial Court. The Supreme Court concluded that the Plaintiff was precluded from contending that the Defendant City had violated any provisions of the prevailing law in California under which a taxpayer may maintain such a suit.

It is your Petitioner's contention raised in the Superior Court, and again raised on a Petition for a Rehearing before the Supreme Court after the unexpected and unanticipated reversal by the Supreme Court, that the decision of the Supreme Court has condoned a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution was committed by the City and City Council of the City of Los Angeles, respectively.

Jurisdiction.

(1) Jurisdiction of this Court is invoked under Title 28, United States Code, Sec. 1257, which provides in part:

> "Final judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By Writ of Certiorari, * * * where any title, right, privilege or immunity, especially set up or claimed under The Constitution, * * *."

(2) The following cases are believed to sustain the jurisdiction of this court:

Fowler v. Rhode Island, 345 U. S. 67;

Niemotko v. Maryland, 340 U. S. 268, 272-273;

Ex parte Virginia, 100 U. S. 339;

Cochran v. Kansas, 316 U. S. 250;

Iowa Des Moines Bank v. Bennett, 284 U. S. 239;

Missouri v. Canada, 305 U. S. 337;

(3) The Supreme Court of the State of California is the highest court of the State;

(4) The judgment of which review is sought is a final judgment of the Supreme Court of California;

(5) The judgment herein sought to be reviewed was filed on November 30, 1961, after decision by the District Court of Appeal affirming the judgment of the Superior Court in favor of the Petitioner herein. A Petition for a Rehearing duly filed was denied on January 9, 1962.

It is the contention of your Petitioner that a Federal question of substantial import has been raised herein, namely, whether in awarding the lease to the defendant development company herein, the City Council violated the equal protection clause of the Fourteenth Amendment of the United States Constitution. It is the further contention of your Petitioner that if the decision of the Supreme Court of California is allowed to stand, it would be contrary to the Fourteenth Amendment of the United States Constitution in that the lease was approved by the City Council in violation of the equal protection of the laws.

(6) The Federal question was timely raised and considered.

In the third cause of action of the Second Amended Complaint, Petitioner alleged as follows:

"The defendant City of Los Angeles, was created as a municipal corporation to act for the protection and welfare of its taxpayers. No authority was vested in said corporation either by charter or by general law to permit the municipality to confer monopolies or special pecuniary benefits to individual members of the municipality not available to other members thereof. Any and all laws or privileges confered by such municipality pursuant to leases granted by ordinance or other legislative act must be a privilege open to the enjoyment of all upon the same terms and conditions. This obligation upon the part of a municipality is likewise imposed by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as well as the Constitution of the State of California. Section 21 (Article 1) of the Constitution of the State of California provides that no citizen shall be granted privileges or immunities which upon the same terms shall not be granted to all citizens.

"The acts of the Los Angeles City Council in restricting lease proposals to one corporation, as hereinabove described, contravenes the provisions of Section 21 (Article 1) of the Constitution of the State of California, as well as the equal protection clause of the Fourteenth Amendment, and the said lease so awarded to the Los Angeles Harbor Oil Development Company is null and void and has conferred no benefits or privileges in said corporation which can be asserted against the City of Los Angeles." [Clk. Tr. Vol. I, p. 134.]

The Superior Court ruled adversely on the Federal question against the Petitioner, as follows:

In Supplemental Findings of Fact, the Court found:

> "No acts or omissions on the part of the defendant, the City of Los Angeles, contravened or violated any rights of Plaintiff under either the Fourteenth Amendment of the Constitution of the United States or the Consitution of the State of California, including Section 21 thereof." [Supp. Clk. Tr. p. 23.]

The Federal question was again arised in the Petition for a Rehearing as follows:

> "In awarding the lease to the Appellant, the Council violated the equal protection clause of the Fourteenth Amendment of the United States Constitution". (Petition for a Rehearing, p. 28.)

The raising of the Federal question in a Petition for Rehearing is timely if it appears that the question was first brought into the case by an unexpected decision of the highest State Court, and that the litigant had no prior opportunity to assert the claim to Federal right or immunity.

Ohio v. Akron Park District, 281 U. S. 74;

Missouri v. Gehner, 281 U. S. 313, 320;

Brinkerhoff Faris Co. v. Hill, 281 U. S. 673, 677;

Carlson v. Curtis, 234 U. S. 103.

Questions Presented.

Did the City of Los Angeles, in awarding a tidelands lease, violate the equal protection clause of the 14th Amendment of the United States Constitution. The further question presented is whether the decision of the Supreme Court of California, if allowed to stand, would be contrary to the 14th Amendment of the United States Constitution in that the lease was approved by the City Council in violation of the equal protection of the laws.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Supreme Court Erroneously Concluded That the Petitioner Lacked Capacity to Maintain This Action as Taxpayer in His Representative Capacity.

It is your Petitioner's contention that the Supreme Court acted under a mistake of law in concluding that the Petitioner did not have capacity to bring such a class action as a taxpayer on his own behalf and on behalf of all other taxpayers the municipal beneficiaries of the trust created in the State-granted tidelands. The California Courts have consistently recognized the right of a taxpayer, in his representative capacity to bring suit to prevent the improper use of the State-granted tidelands or the waste of funds acquired by the municipalities as revenue therefrom.

Trickey v. City of Long Beach, 101 Cal. App. 2d 871;

Mallon v. City of Long Beach, 44 Cal. 2d 199;

Morse v. City of Long Beach, 31 Cal. 2d 254.

cf. Hughes v. City of Torrance, 77 Cal. App. 2d 272.

This Court has similarly recognized the right of a taxpayer to bring suit to question municipal action involving a waste or a potential waste of public funds:

Coleman v. Miller, 307 U. S. 433, 445;

Crampton v. Zabriskie, 101 U. S. 601.

But also in his representative capacity as a class action on behalf of all other taxpayers:

Simley v. Holm, 285 U. S. 355;

Illinois v. Board of Education, 333 U. S. 203.

The Decision of the California Supreme Court Based on Non-Federal Grounds Is Untenable.

The Supreme Court acted under a mistake of law in determining on that a taxpayer in his representative capacity can sue a municipality only in cases involving fraud, collusion, ultra vires, or a failure on the part of a governmental body to perform a duty specifically enjoined.

A Taxpayer Can Sue a Municipality in Cases Involving a Gross Abuse of Legislative Discretion.

The California courts have always recognized that an action by a taxpayer against a municipality will lie where the municipal body has committed a gross or a manifest abuse of discretion. *City of Los Angeles v. Superior Court*, 51 Cal. 2d 423, 432; *Redevelopment v. Hayes*, 122 Cal. App. 2d 777, 812 "(bad faith, fraud, arbitrary action or *abuse of discretion*);" *Luther v. Compton Jr. College*, 77 Cal. App. 2d 719, 726 "(fraudulent or so palbably unreasonably and arbitrary as to indicate *abuse of discretion* as a matter of law);" *City of Roseville v. Tulley*, 55 Cal. App. 2d 601, 608, 609; *Davis v. Santa Ana*, 108 Cal. App. 2d 669; *Pipes v. Hilderbrand*, 110 Cal. App. 2d 645, 649; *City of Oakland v. Williams*, 206 Cal. 315, 327; *Marin Water Co. v. Town of Sausalito*, 168 Cal. 587, 598.

In the First Cause of Action of the Second Amended Complaint plaintiff alleged,

> "In approving the committee report of December 18, 1956, without giving the Union Oil Company of California a reasonable opportunity to submit their lease proposal, in accordance with the extension of time which was granted to them by the committee on industry and transportation, and in adopting the Resolution of December 27, 1956, approving an oil lease to the Los Angeles Harbor Oil Development Company, without first giving either the Union Oil Company or General Petroleum Company a reasonable opportunity to negotiate for a lease with the council, or to submit lease bids to the council in accordance with their request, the members of the council as public officers committed *a manifest abuse of the legislative discretion vested in them*, and the lease so awarded by them to the Los Angeles Harbor Oil Development Company is void." [Clk. Tr. Vol. 1, p. 131.]

The Fourth Cause of Action of plaintiff's Second Amended Complaint alleges that the city became a trustee of an express trust by the acceptance of the grant of the tidelands from the State of California on the conditions imposed by the state. That as such a trustee, the City of Los Angeles assumed the same burdens and was subject to the same regulations that appertain to other trustees of such trusts. That the City in approving an oil lease without first giving either Union Oil Company, Continental Oil Company, Shell Oil Company, Superior Oil Company and General Petroleum Corporation a reasonable opportunity to negotiate for a lease with the City of Los Angeles, and to submit

lease bids to the City of Los Angeles in accordance with the requests made committed an *"abuse of the discretion vested within it as such a trustee."*

The California courts have consistently held that the municipal grantees of the state granted tidelands become a trustee and are subject to the same regulations that appertain to other trustees of such trusts.

In *City of Long Beach v. Morse*, 31 Cal. 2d 254, the Supreme Court said,

> "The City is the trustee and as such assumes the same burdens and is subject to the same regulations that appertain to other trustees of such trusts."

To the same effect is the *City of Long Beach v. Marshall*, 11 Cal. 2d 609, and *Mallon v. City of Long Beach*, 44 Cal. 2d 199.

In *Ellis v. Commissioners*, 38 Cal. 629, the California Supreme Court there said,

> "The commissioners are the exclusive judges of the necessity for such sale or lease until the trust is finally closed, and their action in this respect cannot be impunged, nor its discretion controlled by the City or its grantee, except on the ground of fraud or a *gross abuse of discretion by the trustee.*"

In *McKevitt v. City of Sacramento*, 55 Cal. App. 117, 126, the court there held that it does have the power to review and set aside any act in the execution of the trust constituting an *abuse* by a public body of its powers as a public trustee.

The Trial court found that the land had been granted to the City of Los Angeles by the State of California to be held in Trust. [Clk. Tr. Vol. III, p. 608.]

The trial court found paragrpah XXIII of plaintiff's First Cause of Action to be true. [This paragraph alleged among other things,

> "As stated above, that the members of the council as public officers have committed a *manifest abuse of the legislative discretion vested in them,* and the lease so approved by them to the Los Angeles Harbor Oil Development Company was void." [Clk. Tr. Vol. I, p. 131.]

The Trial Court found paragraph VI of the Fourth Cause of Action to be true. "As stated above and alleged that the City had committed an *abuse of the discretion vested in it as such a Trustee.*". [Clk. Tr. Vol. I, p. 136.]

In its conclusions of law, the Trial Court held that the City had acquired the lands in Trust and as trustees of a voluntary express trust; that as such trustee it assumed and was bound to exercise the same prudence and was subject to the same duties, care and responsibility that apply to other trustees of other voluntary express trusts; that the City did not in the management and leasing of the Trust Estate exercise the judgment and care under the circumstances which men of prudence, discretion and intelligence exercise in the management and leasing of their own property, and the City did not therefore perform a duty imposed and enjoined the law. [Clk. Tr. p. 644 to 646, line 1.]

That a court may review the action of a Trustee for fraud, bad faith *or abuse of discretion* is also indicated by the case of the *Estate of Charters*, 46 Cal. 2d 227.

The California Supreme Court Acted Under a Mistake of Law in Concluding There Was No Basis for Contending the City Did Not Act Fairly Since Plaintiff Stipulated There Was No Actual Fraud, Corruption, Bad Faith, or Undue Influence.

The California Supreme Court in its decision said.

> "All that was required of defendant municipality was that its agents act fairly in all matters respecting the proper discharge of their duties," the court citing *West. Ins. Co. v. Glenn. Irr. Dist.*, 50 Cal. App. 2d 204, 209.

The Supreme Court added.

> "Since it was stipulated that there was no actual fraud, corruption, bad faith or undue influence, there is no basis for contending that they did not act fairly." (57 A. C. at p. 16.)

Actually, plaintiff did *not* stipulate that there was no actual fraud, corruption, bad faith or undue influence. The stipulation was as follows:

> "The plaintiff in this case has not ***alleged*** or *charged*, nor does he intend to charge, any of the defendants in this case with fraud, undue influence, or corruption; that the plaintiff has alleged and is relying upon the theory that the defendant councilmen in their capacity, first, as the members of the city council, and independently of the City Council, that a portion of the council as a committee of industry and transportation, did not pursue, first, the provisions of section 34 of the Charter, and, additionally, did not pursue the provisions of the general law which are applicable to the lease in this case; and consequently and as a result of these

acts, I have alleged and charged that these acts constituted not only * * * a violation of a duty enjoined by law, which is tantamount to an *abuse of legislative discretion*, that insofar as an abuse of discretion is sometimes considered implied fraud or constructive fraud, that if that is the definition of an abuse of discretion then it is my contention that that particular type of fraud would be applicable in this particular case in determining whether or not the facts prove an abuse of the legislative discretion.

"It is my theory and contention, however, * * * in this case, that if the plaintiff proves a violation of the provisions of section 34 of the Charter, that that will, as a matter of law, without the requirement on the part of the court to find that that constitutes an abuse of discretion, automatically be an abuse of discretion sufficient to justify judgment in this case."

"The Court: Just so that the record is clear, insofar as your statement that you do not intend to charge fraud, you are apparently referring to and only referring to actual fraud as distinguished from either constructive or implied fraud?

Mr. Silver: That's right.

Mr. Halverson: * * *. It is my understanding that plaintiff offers to stipulate that in his complaint and in his case, in the evidence to be introduced in the case, that he is not charging fraud, corruption, bad faith, or undue influence, with the exception that he is maintaining that there may be fraud insofar as the claimed failure of the city to perform the requirements of section

34 of the City Charter, or the requirements of the general law. Is that correct?

Mr. Silver: That is correct.

Mr. Halverson: I will accept that stipulation as amended, your Honor.

Mr. Silver: Correction or the requirement of the municipal law or of the federal and state Constitutions, which grant certain privileges and immunities to every citizen on an equal basis; subject also to the correction of bad faith. In other words, I think that the same situation of the fraud implied by a violation of a duty enjoined by law is bad faith and would come under the same interpretation. In other words, a violation of a Charter or a violation of the duty enjoined by general law or constitutional law would automatically constitute bad faith without any particular overt evidence of statements of ill will or malice. So Mr. Halverson, if you will accept my corrections, then we have an accord.

Mr. Halverson: I will accept the correction insofar as it pertains to the Constitution of the United States and the Constitution of the State of California.

The Court: Mr. Halverson, today you did inject the words 'bad faith' as distinguished from the proposed stipulation yesterday; at least, as I noted it yesterday. I suggest that we could have a stipulation that Mr. Silver is not charging actual fraud as distinguished from either implied or constructive fraud, nor undue influence nor corruption.

Mr. Silver: That is it. If we stay right there, right, we are in accord. [illegible] saving the trouble.

Mr. Halverson: I will accept the stipulation as amended by your Honor.

Mr. Young: I will accept the stipulation.

The Court: Is that acceptable to you, Mr. Silver?

Mr. Silver: Yes." [Rep. Tr. p. 5, line 18, to p. 9, line 19; Petition for Rehearing, pp. 3-7, inclusive.]

It is the contention of the petitioner herein that he did not stipulate that there was no actual fraud, corruption, bad faith, or undue influence. The stipulation was to the effect that the plaintiff was,

"not *claiming* * * * any actual fraud or undue influence or corruption on the part of the defendants."

Petition additionally in the stipulated stated to the court he had,

"not *alleged* or *charged* nor does he intend to charge, any of the defendants in this case with actual fraud, undue influence, or corruption."

This did not constitute a waiver that the public officials in question, or any of them, had acted fairly in the discharge of their duties. The so-called disclaimer of actual fraud or actual bad faith or corruption or undue influence did not constitute a waiver of abuse of discretion or constructive fraud. Thus, if the public officials had been guilty of an abuse of discretion or constructive fraud or a violation of a duty enjoined by law or the equal protection of the law, it cannot be argued that the municipality had acted fairly.

In *Cardozo v. Bank of America*, 116 Cal. App. 2d 833, the court defined constructive fraud as follows.

> "Constructive fraud consists;
>
> (1) In any breach of duty which, without an actually fraudulent intent, means an advantageous to the person at fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him." (Civ. Code, Sec. 1573.)

The case was tried in the Superior Court on the basis that constructive fraud was an issue in the case to be determined by the trial court. In the findings of fact, the Trial Court said,

> "That plaintiff, upon the trial hereof, did expressly disclaim any actual fraud, as *distinguished from constructive fraud*, * * * faith—that is, malevolence toward a party on the part of the City of Los Angeles in the execution of the lease." [Finding 82, Clk. Tr. p. 643, lines 12-16; Petition for Rehearing, pp. 10-11.]

In the conclusions of law the trial court said,

> "That the failure and omission on the part of said City as said trustee of an express trust to perform and comply with the said duties specifically imposed and enjoined by law upon it, constitutes a *constructive fraud* and vitiates the transaction, constituting an abuse of its powers as such trustee, irrespective of whether the lease was or was not the best it could procure." [Clk. Tr. p. 645, lines 18-24.]

Consequently the conclusion by the California Supreme Court that there is no basis for contending the

City did not act fairly because the plaintiff had stipulated there was no actual fraud, is unsupported by the stipulation and is contrary to the findings of fact and the conclusions of law adopted by the trial court. Therefore, petitioner contends that the California Supreme Court acted under a mistake of law in concluding that the petitioner had no basis for contending the City did not act fairly, in this, (1) that petitioner did *not* waive actual fraud; (2) assuming he did waive actual fraud, he did not waive abuse of legislative discretion amounting to constructive fraud. (3) The case was tried on the theory that constructive fraud was an issue in the case. (4) The trial court found there was an abuse of legislative discretion amounting to constructive fraud and further found there was an abuse of the discretion as a trustee of an express trust.

The Supreme Court Erroneously Concluded Petitioner Could Not Rely or Contend That the City Had Acted Unfairly by Reason of the Stipulation That There Was No Actual Fraud.

The Supreme Court acted under a mistake of law in concluding that there was no merit in petitioner's contention that though he stipulated there was no actual fraud, he did not waive the fact that there was "constructive fraud."

The Supreme Court in its decision said.

> "The record contains no evidence of constructive fraud, which fact was recognized by plaintiff in his oral argument since he pointed only to facts which would have constituted actual, and not constructive fraud."

This conclusion has erroneously assumed.

First, that the petitioner had stipulated there was no actual fraud.

Second, that the trial court found there was no proof of constructive fraud.

Third, that the record contains no evidence of constructive fraud.

As stated above, your petitioner did not at any time stipulate there was no actual fraud.

Consequently, petitioner cannot be said to have waived the fact that there was "constructive fraud."

The trial court did, in fact, find that there was proof of constructive fraud and made findings and conclusions of law accordingly as follows:

> "That the failure and omission on the part of said City as said trustee of an express trust to perform and comply with the said duties specifically imposed and enjoined by law upon it constitutes a constructive fraud and vitiates the transaction, constituting an abuse of its powers as such trustee, irrespective of whether the lease was or was not the best it could procure." [Clk. Tr. Vol. III, p. 645.]

The following conclusions of law adopted by the trial court were fully supported by the evidence and established an abuse of legislative discretion amounting to a *"constructive fraud"*. No evidence was offered of "fraudulent intent," and had been withdrawn as an issue in the case.

> "(a) Although said trustee had requested of said committee and a duty was imposed by law to

make a complete investigation and a report as to the facts to said trustee, said committee did not make any investigation or report as to the facts as distinguished from only a recommendation of the subject matter involved, but rather without a full investigation and report of facts, reported only a conclusion, which conclusion was adopted without any investigation by said trustee." [C.R. Tr. p. 646.]

"(b) The trustee, City of Los Angeles, administering its power and authority by its committee, consisting of 14 in number, the majority thereof failed and omitted to exercise their own independent discretion and judgment with reference to the management and leasing of the trust estate." [C.R. Tr. p. 646.]

"(c) The committee did not fully, or at all, inform itself concerning the subject delegated to it, and did not communicate to the trustee, the City Council, all of the material and information received and known, actually and constructively, by it, and did not report the facts and findings in relation to the matter in subject, to-wit, the leasing of the trust estate, but merely gave its own recommendation and without further investigation, that said trustee entered into said lease." [C.R. Tr. p. 646, line 25, to p. 647, line 7.]

"(d) The trustee was charged with notice that said committee had not performed the administrative duties delegated to it." [C.R. Tr. p. 647.]

"(e) The committee made no investigation other than arranged conferences with the applicant whose lease it recommended and did not di-

close to nor advise nor refresh the memories of the remaining members of the city council who constituted the trustee that requests for negotiations for leases had been received from qualified, experienced, and financially responsible applicants but that no negotiations were entered into therewith; that the committee had not followed and was not following the advice of petroleum and geology experts hired by the trustee; that the committee had not made any attempt whatsoever to solicit or procure other applicants for leases; that the committee had not disclosed to other prospective applicants information within the possession, knowledge and control of the committee as to the subject lands, their description and the opinions of experts hired by the trustee as to the probable or possible existence of oil, gas and other hydro-carbon substances therein; that an applicant had filed a petition for deferment of action by the trustee, the City Council, until such applicant could confer with the committe and the trustee; that the committee did not report to the trustee, the City Council, facts, but only a conclusion, to-wit, a recommendation; that the remaining members of the City Council (the City Council as a body being the trustee) made no investigation or were not aware of the facts involved in the transaction." [Clk. Tr. p. 647, line 19, to p. 648, line 12.]

"(f) That although the Trustee, the City Council, as a matter of common prudence had theretofore retained, sought and received the advice of experts pertaining to the management and leasing of the trust estate, it did not, in the matter of the

leasing of the trust estate, confer with or seek the opinion of such experts; it disregarded their prior advice given, and withheld from other highly experienced, capable, financially responsible and desirous lessees, such information in the possession of said trustee procured by it from its said experts as to the potential possibilities of the development of the lands desired to be leased." [Clk. Tr. p. 648, lines 13 to 22.]

"(g) That although requested by other highly experienced, capable, financially responsible and desirous lessees to negotiate with them, the trustee failed and omitted so to do and withheld from such applicants, though requested by them, information in the possession of the trustee as to the potentials of the trust land desired to be leased." [Clk. Tr. Vol. III, p. 648, lines 23 to 28.]

"(h) That though the trustee had expended substantial funds for a determination of the possible potential value of the trust estate and had received written opinions from experts retained by the trustee hypothesizing the possibility of oil and gas existing in the trust property, the trustee, knowing that the applicants had not the opportunity to make an investigation thereof, notwithstanding the said applicants request for information concerning the existence thereof in the possession of the trustee, and notwithstanding that the reports of the said trustee's experts were public records, said trustee withheld from the applicants the information concerning the existence of such reports and incorrectly advised the applicants that

it had no information with reference thereto. That notwithstanding the fact that applications for leasing and request for negotiations for leasing were made to the trustee through the committee by other companies involved in the exploration and development of properties from oil, gas and other hydro-carbon substances, and without a full and complete investigation, the trustee failed and omitted to negotiate with such applicants, disregarded the advice of the experts theretofore retained by the trustee, set no standards as advised by the experts to enable competitive bidding, and without solicitation of any offers upon an equal footing from other experienced, capable and financially responsible applicants within the business field for which trust property was deemed valuable, leased the trust property to a corporation without equipment, organization or capital, but whose organizers were otherwise financially capable though under no legally binding contract so to do to provide such capital." [Clk. Tr. p. 649, line 9.].

"(i) At the time of the adoption of the report of the committee and in resolving upon the execution of the lease to the defendant Harbor Company and the adoption of the ordinance, the members of the committee had stated and represented to the council that the lease to the Harbor Company was the best they could get and the members of the council therefore relied thereon. That said report of the committee was not factual, or correct, or accurate, or the result of any investigation of the subject." [Findings of Fact, p. 643, lines 1 to 8.]

The foregoing findings and conclusions of law were based upon evidence presented *without any proof of actual intent* upon the part of either the committee or any members thereof or of any members of the council to cheat the City of Los Angeles. The following authorities from California and the highest courts of other state jurisdictions establish that the foregoing findings and conclusions of law are a form of constructive fraud. *VonHolt v. Izumo Mission of Hawaii*, 42 Haw. 674; *The Taxpayers League of Wayne County v. Whitman*, 291 N. W. 881.

In *Johnson v. Radio Station WOH*, 13 N. W. 2d 550, 561, the Supreme Court of Nebraska in defining constructive fraud said,

> "'Legal fraud' is synonomous with 'constructive fraud' * * *."

To the same effect is the case of *Cardozo v. Bank of America*, 146 Cal. App. 2d 833 (Supreme Court hearing denied). The Appellate Court in its decision pointed out in that case that there could be no actual fraud "without *intent* to deceive" but nevertheless in that case, the court did find that there was constructive fraud sufficient to have supported a judgment and reversed the judgment. Similarly in that case, the court defined constructive fraud to consist of,

> "Any breach of duty which without an actually fraudulent intent brings an advantage to the person at fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him." The court citing Civil Code Section 1573.

The Supreme Court Acted Under a Mistake of Law in Differentiating Between Actual Fraud and Constructive Fraud as a Basis for Denying Petitioner Capacity to Sue.

The courts of California have consistently held that although a given set of facts may not amount to an actual fraud; a constructive fraud may be found therein and that its legal effect shall be the same.

In the case of *Herd v. Touhy*, 133 Cal. 55, the Supreme Court in commenting on the effect of a constructive fraud stated:

> "This, although not fraud, was one of those cases that, in the words of a leading authority, ought to be treated as fraud,—that is, it is a constructive or quasi fraud, having all the actual consequences and all the legal effects of fraud."

In the later case of *In re Arbuckle's Estate*, 98 Cal. App. 2d 562, it was similarly conceded that there was no actual fraud in the present case. However, the court did find the presence of constructive fraud there and in commenting upon this, stated,

> "In its generic sense, constructive fraud comprises all facts, omissions and concealments involving a breach of legal or equitable duty, trust, or confidence and resulting in damage to another. Constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be so treated."

Also cited to the same effect is *Exers v. Greenwood*, 139 Cal. App. 2d 345.

The Supreme Court Acted Under a Mistake of Law in Concluding That Petitioner Lacks Capacity to Sue in the Present Action.

The conclusion reached by the Supreme Court that Plaintiff did not have capacity to sue has overlooked the conclusions of law reached by the trial court, to wit:

(a) "That the defendant City of Los Angeles did not, in the management and leasing of said trust estate, to-wit, the submerged lands situate outside the breakwater of outer Los Angeles Harbor, the subject of the lease to Harbor Company, exercise a judgment and care under the circumstances which men of prudence, discretion and intelligence exercise in the management and leasing of their own property, in the exercise of the highest good faith to and for its beneficiary, and said City did not therefore perform a duty imposed and enjoined by law upon it." [Clk. Tr. p. 645, line 25, to p. 646, line 1.]

(b) "Though said trustee had requested of said committee and a duty was imposed upon it by law to make a complete investigation of and a report as to the facts to said trustee, said committee did not make any investigation of or report as to the facts, as distinguished from only a recommendation, of the subject matter involved, but rather without a full investigation and report of facts, reported only a conclusion, which conclusion was adopted without any investigation by said trustee. A trustee has no right or power to delegate its duties as trustee, either to a stranger or to a minority of the persons constituting the trustees." [Conclusions of Law, Clk. Tr. p. 646, lines 6 to 16.]

(e) "The trustee, City of Los Angeles, administering its power and authority by its councilmen, consisting of 14 in number, the majority thereof failed and omitted to exercise their own independent discretion and judgment with reference to the management and leasing of the trust estate. The council of the City of Los Angeles had no legal authority to delegate its powers and duties as trustee of the express trust relating to the said subject lands to a minority thereof, to wit, the committee." [Conclusions of Law, Clk. Tr. p. 640, lines 17 through 25.]

On the basis of the foregoing conclusions of law reached by the trial court, and irrespective of the conclusions reached by the Supreme Court regarding the extent and character of the fraud herein, it is clear that petitioner does have capacity to sue based upon the failure on the part of a governmental body to perform a duty specifically enjoined, and that the Supreme Court acted under a mistake of law in concluding that petitioner lacked capacity to sue.

Where Competition Is Restrained, Any Municipal Contract Awarded Under Such Conditions Is Invalid.

Petitioner contends that in cases where there has been substantial evidence of suppression of competition in the awarding of a municipal contract, as is the case here, the courts of California have consistently held that such facts would vitiate the contract and make it null and void. The Superior Court of California, in reversing the decisions of the courts below declaring the lease in question herein void, has given force and effect to a

situation which the courts have historically provided protection against under its policy of invalidating transactions in which competition is restrained thereby leading to the waste of public funds, to the detriment of the municipal taxpayers.

Morgan v. Gove, 206 Cal. 607;

California v. Reynolds, 123 Cal. 88;

Ertle v. Leary, 114 Cal. 238.

The Acts of a Municipality in Its Capacity as the Trustee of an Express Trust Are Subject to Judicial Review for Acts Tantamount to a Breach of Trust.

When a municipality is acting as the trustee of an express public trust in negotiating an oil and gas lease on a portion of the trust property, the courts of California have always held that municipal action is subject to scrutiny to insure that the conditions and restrictions imposed in dealing with the municipality are reasonable, and consistent with the public policy to prevent favoritism and assure uniform conditions in order to obtain the greatest possible benefit in behalf of all the taxpayers of the municipality.

Holland v. City of San Francisco, 7 Cal. 361;

McKevitt v. City of Sacramento, 55 Cal. App. 117;

2 Scott on Trusts (2nd Ed.), Sec. 174, p. 1295;

Bogert, Trusts and Trustees (2nd Ed.), Sec. 541, pp. 447, 448, 457.

Opinions of the Courts Below.

The decision of the Supreme Court of California, reversing the decisions of the Courts below is hereto attached as Appendix A. The decision of the District Court of Appeal, affirming the ruling of the trial court, may be found in 192 A. C. A. 787, 14 Cal. Rptr. 192.

Summary of Argument.

(1) The procedure and methods used by the City Council of the defendant City of Los Angeles in granting said lease to the defendant development company was a violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States causing a breach of the public trust and leading to the potential injury to the Municipal taxpayers.

(2) The decision of the Supreme Court of California in granting said lease to the defendant development company, if allowed to stand, would condone a violation of the rights guaranteed under the Fourteenth Amendment of the Constitution of the United States resulting in ultimate injury to the taxpayers.

Conclusion.

Your petitioner respectfully submits that the *Writ of Certiorari* should issue to the end that this Court may review the decision of the Supreme Court of the State of California and determine whether the Defendant City of Los Angeles has denied any rights guaranteed by the Fourteenth Amendment of the Federal Constitution, and whether this denial has been erroneously approved by the Supreme Court of California.

Respectfully submitted,

PHILIP SILVER,

Plaintiff in Pro. Per.

APPENDIX A.

Opinion of Supreme Court of California.

[L. A. No. 25816. In Bank. Nov. 30, 1961.]

Phill Silver, as a Taxpayer, etc., Plaintiff and Respondent, v. The City of Los Angeles et al., Defendants and Appellants.

[On hearing after decision by the District Court of Appeal, Second Appellate District, Division Two, Civ. No. 24601 (192 A.C.A. 787, 14 Cal.Rptr. 192) affirming judgment of the superior court. Judgment reversed.]

Appeals from a judgment of the Superior Court of Los Angeles County. Alfred Gitelson, Judge. Reversed.

Action by a taxpayer of a charter city to have declared void and to set aside an oil and gas lease to tidelands which the city held as trustee. Judgment for plaintiff reversed.

Roger Arnebergh, City Attorney, Bourke Jones, Assistant City Attorney, Spencer L. Halverson, Deputy City Attorney, Young & Prenner, James J. Ardito, Ronald H. Prenner, Claude E. Young, Melvin L. Pierovich, Ball, Hunt & Hart and Joseph A. Ball for Defendants and Appellants.

Phill Silver, in pro. per., for Plaintiff and Respondent.

Stanley Mosk, Attorney General, Jay E. Shavelson and N. Gregory Taylor, Deputy Attorneys General, as Amici Curiae on behalf of Plaintiff and Respondent.

McComb, J.—Defendants appeal from a judgment in favor of plaintiff after trial before the court in an action brought by plaintiff as a taxpayer to have declared void, and to set aside, an oil and gas lease be-

tween defendant City of Los Angeles, as lessor, and defendant Los Angeles Harbor Oil Development Co., as lessee, covering approximately 6,400 acres of submerged lands in the Los Angeles Outer Harbor.

This is the sole question necessary for us to determine: *May a taxpayer bring a representative action to set aside a contract entered into between a municipality and a private corporation relative to lands held by the municipality in trust, in the absence of fraud, collusion, ultra vires, or a failure on the part of the municipality to perform a duty specifically enjoined?*

A taxpayer in his representative capacity can sue a municipality only in cases involving fraud, collusion, ultra vires, or a failure on the part of the governmental body to perform a duty specifically enjoined. (*Nickerson v. County of San Bernardino*, 179 Cal. 518, 522 [177 P. 405]; *Dunn v. Long Beach L. & W. Co.*, 114 Cal. 605, 609 [46 P. 607]; *Pratt v. Security Trust & Savings Bank*, 15 Cal.App.2d 630, 636 [1] et seq. [59 P.2d 862]; 18 McQuillin, Municipal Corporations (3d ed. 1950) § 52.07, p. 23; *cf.* 124 A.L.R. (1940) pp. 1238-1240.)

In the instant case it was stipulated by the parties at the beginning of the trial that there was no actual fraud, corruption, bad faith, or undue influence involved in the granting of the lease by defendant municipality to defendant development company. Ultra vires was not pleaded, nor was any evidence thereof presented during the trial.

Plaintiff contends that defendant municipality was bound by section 2261 of the Civil Code and the common law of trusts to administer the trust property with the care and skill which a man of ordinary prudence would exercise in dealing with his own property; that defendant councilmen, acting on behalf of defendant municipality, did not exercise such degree of care and skill in the negotiations for the lease; and that their failure to do so constituted a failure by said defendant to perform a duty specifically enjoined.

Although the proper use of the tidelands and tideland revenue is a statewide affair (*People v. City of Long Beach*, 51 Cal.2d 875, 883 [5] [338 P.2d 177]; *Mallon v. City of Long Beach*, 44 Cal.2d 199, 209 [9] [282 P.2d 481]; *City of Long Beach v. Morse*, 31 Cal.2d 254, 264 et seq. [188 P.2d 17]), this does not mean that the administration of the trust is in all matters a statewide affair. (*Cf. Douglas v. City of Los Angeles*, 5 Cal.2d 423, 428 [2] [53 P.2d 353]; *Helbach v. City of Long Beach*, 50 Cal.App.2d 242, 246 [3] [123 P.2d 62].)

Defendant municipality is a charter city, and until the Legislature acts to provide otherwise, the manner in which it effectuates the purposes of the tidelands trust, including the manner in which it conducts negotiations for the leasing of the lands, is a municipal affair. (6 Cal. Const., art. XI, §§ 6, 8; *cf. Dynamic Industries Co. v. City of Long Beach*, 159 Cal.App.2d 294, 299 [5] [323 P.2d 708] [hearing denied by the Supreme Court].)

At the time the lease was executed (December 28, 1956) and ratified (January 14, 1957), there was no relevant charter or statutory provision directing the manner in which the lands were to be leased.*

All that was required of defendant municipality was that its agents act fairly in all matters respecting the proper discharge of their duties. (*West etc. Ins. Co. v. Glenn etc. Irr. Dist.*, 50 Cal.App.2d 204, 209 [2] [122 P.2d 595].) Since it was stipulated that there was no actual fraud, corruption, bad faith, or undue influence, there is no basis for contending that they did not act fairly.

On the contrary, in view of the stipulation it must be found that defendant councilmen applied their honest, considered judgment to the problem at hand. Under such circumstances, they are answerable to the electorate, but not the courts, if they were mistaken or were wanting in business acumen. (*West etc. Ins. Co. v. Glenn etc. Irr. Dist., supra*, at 209, 211.)

There is no merit in plaintiff's contention that though he stipulated there was no "actual fraud," he did not waive the fact that there was "constructive fraud," be-

*In 1959 the Legislature enacted specific legislation governing the procedures by which oil and gas leases are to be granted by municipalities. It requires advance publication of a resolution which specifies the minimum royalty, the term of the lease, its form, and one variable bidable factor on which sealed bids are to be received. The lease must go to the highest responsible bidder. This legislation applies to cities operating under the general laws with respect to all oil and gas leases, and to charter cities only with respect to tide and submerged lands granted in trust to them by the state. (Pub. Resources Code, §§7058.5, 7059, 7060, 7061.)